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Monopoly or Monopolization— A Reply to Professor Rostow†

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ECONOMISTS for some years have been disturbed by the fact that their ideal concept of "pure competition" rarely exists in the real business world.[1] This concept of pure competition requires two premises—"that there are many sellers and that the product sold is undifferentiated."[2] In this hypothetical market the laws of supply and demand will fix price and volume of production at the most efficient and therefore socially desirable point.[3]

But insofar as industry structure departs from the two theoretical premises, the pattern of market behavior may also

† This article is written in reply to Professor Rostow's article Monopoly Under the Sherman Act: Power or Purpose? (1949) 43 Ill. L. Rev. 745 and to the discussion of the Sherman Act in the final section of his book, A National Policy for the Oil Industry (1948). The analysis found in this article was presented orally at the symposium on anti-trust problems conducted at Northwestern University School of Law, Nov. 29, 1948, under the auspices of the Charles Clarence Linthicum Foundation.

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1 "Because most prices involve monopoly elements, it is monopolistic competition that most people think of in connection with the simple word 'competition.' In fact, it may almost be said that under pure competition the buyers and sellers do not really compete in the sense in which the word is currently used. One never hears of 'competition' in connection with the great markets, and the phrases 'price cutting,' 'underselling,' 'unfair competition,' 'meeting competition,' 'securing a market,' etc., are unknown. No wonder the principles of such a market seem so unreal when applied to the 'business' world where these terms have meaning. They are based on the supposition that each seller accepts the market price and can dispose of his entire supply without materially affecting it. Thus there is no problem of choosing a price policy, no problem of adapting the product more exactly to the buyers' (real or fancied) wants, no problem of advertising in order to change their wants. The theory of pure competition could hardly be expected to fit facts so far different from its assumptions." Chamberlin, The Theory of Monopolistic Competition (6th ed. 1948) 10; See Robinson, Economics of Imperfect Competition (1933), Introduction.

2 Fly, Observation on the Anti-trust Laws, Economic theory and the Sugar Institute Decisions: I (1936) 45 Yale L. J. 1339, 1342. Robinson *op. cit. supra* note 1, at 18; Chamberlin, *op. cit. supra* note 1, at 7-10.

3 *Cf.* Robinson, *op. cit. supra* note 1, at 97: "It is only if conditions of perfect competition prevail that firms will be of the optimum size, and there is no reason to expect that they will be of optimum size in the real world, since in the real world competition is not perfect." See Pigou, Economics of Welfare (3d ed. 1929) 129-144, 805; Robinson, *id.* at 95-97; Chamberlin, *op. cit. supra* note 1, at 25.

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depart from the theoretical ideal. As competing sellers build up consumer preferences by advertising, brand names, and other sales devices, they tend to destroy the economists' ideal market.[4] Again as one seller is more astutely managed, more favorably located, or perhaps just more fortunate than his competitors, he tends to drive some competitors out of business and thus to reduce the number of sellers in the market. These two tendencies, both resulting from genuine competitive drives, are destructive of the ideal market. To the extent that competition has destroyed this ideal market, there is a possibility that price, and therefore production, will not be determined in the maximum social interest. For the seller then has some power to choose between a policy of selling more for less and a policy of selling less for more. Insofar as he has this power to choose, economists say that his profits will be higher if he decides to produce less and charge more than the purely competitive price.[5] But this choice, they also say, is socially undesirable because it leads to waste—productive capacity is not used to maximum advantage, prices are higher than they should be, and the laws of supply and demand do not operate with classroom precision.[6]

The two remedies for the situation are obvious. Make sure that products are undifferentiated and make sure that there are many sellers. The first remedy is extremely drastic; most advertising would have to be proscribed, trade-mark legislation repealed, and perhaps "unfair competition" should be fostered.[7] But since the ideal of perfect competition would not be an unmixed blessing, the Congress, instead of acting against product differentiation, has recently given added legislative protection to imperfect competition.[8]

The second remedy is even more drastic. For in the typical American industry a fairly small number of large companies sell

[4] Chamberlin, *op. cit. supra* note 1, cc. IV, V; See Rostow, A National Policy for the Oil Industry (1948) 14, 126, 136.

[5] Robinson, *op. cit. supra* note 1, c. XI. But see pp. 152-153 for discussion of the theoretically exceptional case where monopoly output will exceed competitive output.

[6] One of the supposed evils resulting from having too few sellers in the market is the maintenance of a higher-than-purely-competitive price level; such a price level enables the inefficient, or marginal, producer to stay in business. *Cf.* Chamberlin, *op. cit. supra* note 1, at 109. Presumably then, if competitive prices prevailed, this inefficient producer would be driven out of business and the number of sellers would be further decreased. In short, because there are too few sellers, there are too many sellers.

[7] See Braithwaite and Dobbs, The Distribution of Consumable Goods (1932); Burns, The Decline of Competition (1936) c. VIII.

[8] By enacting the Lanham Act, 60 Stat. 427, 15 U.S.C. 1051 (1946), Congress proposed to increase the trade-mark protection of "the psychological function of symbols", see Sen. Rep. 1333, 79th Cong. 2nd Sess. (1946). *Cf.* also the effect of the Miller-Tydings Act, 50 Stat. 209, 15 U.S.C. 1 (1937), and the Robinson-Patman Act, 49 Stat. 1528, 15 U.S.C. 13 (1936), on the purely competitive market.

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a very large percentage of the goods. The structure of the typical industry must, therefore, be altered radically by breaking the few giants into a host of midgets. The size and number of midgets would presumably be determined by reference to the ideal of pure competition.[9]

Some economists, Professor Rostow in particular, believe that such a program should be undertaken.[10] And Professor Rostow believes that this basic change should be made through judicial proceedings rather than through legislation and continuing administrative control.[11] More than this, as a lawyer, Professor Rostow believes that the recommended judicial surgery may be performed under existing law.[12]

Economists may properly debate the wisdom of this radical reform in order to hasten or to deter its legislative acceptance. They may ask whether the ideal is attainable in practice[13] and whether the advantages of size, in terms of efficiency, social responsibility, and potential industrial progress, do not outweigh

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9 Since the crime is said to consist in "taking advantage . . . . of the structural character of [the] market to gain monopoly profit," Rostow, Monopoly Under the Sherman Act: Power or Purpose? (1949) 43 Ill. L. Rev. 745, 772, there is no other logical stopping-place, though practical considerations would necessitate some sort of compromise with the theoretical ideal. Professor Rostow uses the phrase "workable competition" to suggest this compromise. See *Id.* at 785. But the status quo, even in the oil industry where there are as many as twenty majors, is considered unworkable.

10 Rostow, *op. cit. supra* note 4 at 123ff. Professor Rostow does not expressly state that such a broadside attack should be made on all industries dominated by a few large sellers. But the logic of his position would seem to compel this result. For he contends that no remedy short of decentralization can prevent the evils of monopolistic competition. If the evils inevitably result from the structure of the industry, the same structure in other industries would inevitably result in the same evils and call for the same remedy.

This conclusion may over-simplify the problem because it does not take into account the factor of product differentiation. This factor may interfere with a seller's ability to predict reactions of his competitors to his price changes, and thus, though itself a monopolistic factor, tend to keep prices below the monopolistic level. *Cf.* Chamberlin, *op. cit. supra* note 1, at 51-53. But Professor Rostow's argument would seem to apply at least to every industry producing a reasonably homogeneous product, and probably, in view of his non-economic arguments (see Rostow, *op. cit. supra* note 4, cc. XII-XIII), to "bigness" wherever found. In fact, since he considers "monopoly profit" the evil which must be prevented and since some monopoly profit is earned in every industry (see notes 1, 3, and 10 *supra*), every businessman would seem to be violating the Act.

11 *Id.* at 123. Perhaps this is partly because he feels that the Supreme Court is more likely than Congress to approve of the program. It is of interest that Professor Rostow considers divorcement of the pipe lines from major company ownership as the most essential step in the decentralization program and that Congress considered and rejected an amendment to the commodities clause, 34 Stat. 585, 49 U.S.C. §1(8), that would have had exactly that effect. See S. 2009, §12, 76th Cong., 1st Sess. (1939); Hearings before Senate Committee on Interstate Commerce on S. 2009, 76th Cong., 1st Sess. 386, 589-597, 606-610, 611-612, 654-660, 736-742.

12 This is a fair conclusion to be drawn from c. 14 of Rostow, *op. cit. supra* note 4. In spite of the intervening decision in United States v. Columbia Steel, 334 U.S. 495 (1948), Professor Rostow adheres to his position in the later article. Rostow, *supra* note 9, at 785-789.

13 Even with many sellers, monopoly prices will obtain in every market in which a price leader is recognized. See Chamberlin, *op. cit. supra* note 1, at 50.

the possibile advantages of pure competition.[14] Lawyers as well as economists may also wonder whether judges are fitted to cope with the problem—whether they can fairly determine the size and number of permissible units in every industry, and whether they have the time and energy to perform this enormous and inevitably continuing task in addition to their more traditional judicial duties.[15] Can the judicial doctors successfully perform such an operation on the entire American economy without killing their patient?

But it is not the purpose of this article to attempt to answer those questions or to take issue with Professor Rostow the economist.[16] It is our purpose to take issue with Professor Rostow the lawyer. In essence he has concluded that "mere size" violates Section 2 of the Sherman Act. He believes that market power is the crux of the offense of monopolization and that the requisite degree of power may be found by looking at several independent business units in the aggregate merely because they take "parallel action in response to the stimuli of the market."[17]

Professor Rostow contends that a concern doing business in a market in which price is determined by "monopolistic competition"

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14 See *e.g.* the summary of advantages of combinations outlined by Professor Bogart:

> "The following are the chief economies of production effected by combination: (1) only the best located and most efficiently equipped plants are operated, as in the former whiskey trust; (2) obsolete machinery is scrapped and only the best is used, thus applying the latest inventions and utilizing patents; (3) the best ideas in the combining plants are exchanged, and the efficiency of all raised to the level of the best, as in the sugar and tobacco trusts; (4) by engaging in the manufacture of several different articles, the risks are better distributed, as in the case of General Motors; (5) by-products are utilized; (6) the best managerial talent and organizing ability are obtained; (7) there is greater division of labor, finer specialization, and better organization.
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> "The peculiar economies obtained by combinations lay, however, rather in the savings in marketing than in production, and these may be summarized as follows: (8) better bargaining power exists in the purchase of raw materials; (9) there is better command over capital and credit facilities; (10) the cost of advertising, of traveling salesmen, and of other items which figure largely in a strongly competitive business, may be materially reduced under combination; (11) saving in cross freights is effected in the case of those trusts which have plants located in various parts of the country, and which can fill orders from the nearest plant; (12) various other economies in the organization of the business and the sale of the products." Bogart, Economic History of the American People (2d ed. 1938) 582-583.

15 *Cf.* the recent statement of the Court in a footnote to Standard Oil Co. v. United States, 17 U.S. L. Week 4510, 4515 (1949):

> "The dual system of enforcement provided for by the Clayton Act must have contemplated standards of proof capable of administration by the courts as well as by the Federal Trade Commission and other designated agencies. See 38 Stat. 734, 736, as amended, 15 U.S.C. §§21, 25. Our interpretation of the Act, therefore, should recognize that an appraisal of economic data which might be practicable if only the latter were faced with the task may be quite otherwise for judges unequipped for it either by experience or by the availability of skilled assistance."

16 But see Adelman, Competition and the Anti-trust Laws (1948) 61 Harv. L. Rev. 1289.

17 Rostow, *supra* note 9, at 763.

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is guilty of the crime of "monopolization."[18] He does not, however, base his legal argument on the verbal similarity of the economists' description of the typical modern market as "monopolistic" and the legal term "monopolization" used in Section 2 of the Sherman Act. This similarity is purely coincidental[19] since the economists did not develop the theory of monopolistic competition until long after the Sherman Act was passed.[20] Instead, Professor Rostow argues broadly that the philosophy of the Sherman Act is competition—that perfect competition does not exist in industries dominated by a small number of sellers, and therefore the purpose of the Act justifies the decentralization of industry.[21] In short, "mere size" is a crime.

"Size" as a legal test of monopoly must of course refer to the size of a business unit relative to the size of the industry in which it competes. A two-million dollar concern would be a giant in the bottle-cap industry, but a pigmy in the steel industry. The test is one of "relative size" not "absolute size." And even "relative size" is size relative to many factors; it is not the same percentage for every industry. Variations in the number of producing units, in the initial cost of entering the field, in the availability of other products to satisfy the same general demand, in the amount of good will which has attached to products already in the field, in the elasticity of the demand for the product, in general economic conditions—these and many other variables enter into the concept of "relative size."

[18] "The Supreme Court is on the threshold of recognizing what the economists call monopolistic competition as the offense of monopoly under Section 2 of the Sherman Act." Rostow, *op. cit. supra* note 4, at 126. In the article he expressly states that gaining monopoly profit is the result which is condemned by Section 2. Rostow, *supra* note 9, at 772.

[19] In fact, insofar as the objection to "monopolistic competition" is an objection to price-leadership and an abnormally high level of prices, the two concepts—"monopolistic competition" and "monopolization"—are diametrically opposed. For the crime is one of excluding competition and a high price level would facilitate the entry of competitors, rather than exclude them. See Chamberlin, *op. cit. supra* note 1, at 83-84, 90. *Cf.* Rostow, *op. cit. supra* note 4, at 93.

Moreover, since "monopolistic competition" more nearly resembles the laymen's concept of "competition" than does "pure competition," *Cf.* note 1 *supra,* the laymen who drafted the Sherman Act more probably intended to protect what is now called "monopolistic competition" than an economic concept with which they were unfamiliar.

[20] Attempts to explain the working of our economy in terms of "monopolistic competition" began in the 1920's (see Chamberlin, *op. cit. supra* note 1, at 5-6) and progressed rapidly after the publication in 1933 of Chamberlin's "Theory of Monopolistic Competition" and Robinson's "Economics of Imperfect Competition." The framers of the Sherman Act used the word "monopolize" in its common law sense. See Adler, Monopolizing at Common Law and Under Section Two of the Sherman Act (1917) 31 Harv. L. Rev. 246. Adler draws this conclusion from explicit statements in Congressional debates, and from the fact that the prohibitions of §1, but not those of §2, were made applicable to the District of Columbia. Since §2 merely enacted common law rules for the field of interstate commerce, whereas §1 broadened the common law, there was no need to make §2 applicable to the District where the common law was already in force.

[21] See Rostow, *op. cit. supra* note 4, at 124-126; note 9 at 772, 776, 783.

These variables, though indicating the difficulty of using size as a test of violation, may be disregarded for the purpose of defining terms. In a hypothetical example, it may be assumed that each of three companies controls thirty per cent of the productive capacity, and that an infinite number of companies divide up the remaining ten per cent. The size of the three, if combined, we shall call "monopoly size"; a combination of ninety per cent of productive capacity creates "monopoly power." Each of the three, even when acting alone, is of "impressive size;" alone each has the power substantially to influence price.

The problem of size can best be approached by treating three separate situations separately. The first is the case where one company of monopoly size dominates an industry. The second is the case of several companies of impressive size actually agreeing among themselves to acquire or maintain monopoly control of the industry. In the third case there is no agreement among the several companies, but they take "parallel action in response to the stimuli of the market."[22] The situations are illustrated by the *Alcoa* case,[23] the recent *Tobacco* case,[24] and the oil industry as described by Professor Rostow.[25] These three situations will be discussed in separate parts of this article in order to show: (1) that mere size, even monopoly size, is not an offense; (2) that the crime of monopolization is not established without proof of at least two of the following three elements—(a) wrongful acquisition of, or specific intent to acquire, monopoly power; (b) the power itself; and (c) wrongful exercise of the power or specific intent to exercise it wrongfully; (3) that the Supreme Court will not hold impressive size unlawful by (a) implying an intent to monopolize, or (b) implying a conspiracy among several companies of impressive size where no conspiracy exists.

I.

The size of a company cannot in and of itself constitute a violation of Section 2 unless it is big enough to be a monopoly and unless it is also true that all monopolists necessarily commit the crime of "monopolizing"—the fact that the statute uses the verb, not the noun, to define the crime is important.[26] For even though

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22 Rostow, *supra* note 9, at 763.

23 United States v. Aluminum Co. of America, 148 F. (2d) 416 (C.A. 2d 1945). Because a quorum of the Supreme Court was not qualified to hear the appeal from the District Court, the case was referred to the Court of Appeals as court of last resort. See 58 Stat. 272, 15 U.S.C. Supp. V, §29 (1944); United States v. U. S. District Court, 334 U.S. 258 (1948).

24 American Tobacco Co. v. United States, 328 U.S. 781 (1946).

25 Rostow, *op. cit. supra* note 4, *passim*.

26 Section 2 of the Sherman Act provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the

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"no monopolist monopolizes unconscious of what he is doing,"[27] it is not true that every monopolist monopolizes.

As pointed out above, more than a simple percentage test is needed to determine whether a company is big enough to deserve the name "monopoly." Nevertheless, the decided cases make it clear that the requisite percentage is always so high that it is found in few, if any, companies today. The Court has ruled that 64% of the farm machinery industry[28] and 50% of the steel capacity[29] do not amount to monopoly; the Attorney-General has recently reached the same conclusion as to steel.[30] And Judge Learned Hand summed up the percentage tests in the *Alcoa* case by stating that a percentage of over ninety "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four per cent would be enough; and certainly thirty-three per cent is not."[31] The question whether a company controls a sufficiently large percentage of an industry to be classified as a monopoly is, however, different from the question whether it has violated the Sherman Act. Control of ninety per cent of the nation's aluminum capacity in the hands of a single producer constituted a monopoly "of the kind covered by Section 2", but it did not follow from that fact alone that Alcoa had committed the crime of monopolizing.[32] In other words, the violation was not established by the "mere size" of the defendant. This recognition that the Act does not condemn mere bigness, even when amounting to monopoly, was required by repeated statements of the Supreme Court.

The *United States Steel* case is the leading authority on the precise point. There the Court unequivocally stated that "the law does not make mere size an offense."[33] This pronouncement has

trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 26 Stat. 209, 15 U.S.C. 2 (1890).

27 See 148 F. (2d) at 432.

28 United States v. International Harvester Co., 274 U.S. 693, 701, 704, 708-709 (1927).

29 United States v. U. S. Steel Corp., 251 U.S. 417 (1920).

30 See United States v. Columbia Steel Co., 334 U.S. 495, 505-506 (1948). The Attorney General was of the opinion that acquisition of the Geneva steel plant, which would increase U. S. Steel's ingot capacity to 32.7% of the national total and from 17.5% to either 39% or 51% (depending on which estimate was accepted) of the Pacific Coast area total, would not of itself be illegal. Although approving of the power resulting from the acquisition, the Attorney General expressed no opinion about the legality of possible uses of this power.

31 148 F. (2d) 416, 424. This statement is not merely dicta. If the Court had not felt it necessary to find the ninety rather than the sixty-four per cent control, the discussion of the secondary aluminum market would have been unnecessary. See pp. 424-425. *Cf.* 251 U.S. 417, 444.

32 148 F. (2d) at 429.

33 251 U.S. at 451.

been challenged as an incorrect statement of the law, the challenge sometimes resting on the ground that the statement was merely dictum and sometimes on the ground that the old *Steel* case has been overruled or at least seriously discredited.[34]

The statement is damned as dictum because the defendant controlled only 50% of the nation's steel capacity and therefore was not big enough to call for a ruling on the legality of monopoly size. But this disregards two important considerations—the argument of the Government and the view of the dissenting justices. The Government had raised the issue sharply by contending that in view of the manner in which the defendant had grown to such great size, this mere size violated the law regardless of any purpose to exercise wrongfully its power over prices and production. As the Court stated the contention:

> The Government, therefore, is reduced to the assertion that the size of the Corporation, the power it may have, not the exertion of the power, is an abhorrence to the law, or as the Government says, 'the combination embodied in the Corporation unduly restrains competition by its *necessary effect,* [the italics are the emphasis of the Government] and therefore is unlawful regardless of purpose.' 'A wrongful purpose,' the Government adds, is 'matter of aggravation.' The illegality is statical, purpose or movement of any kind only its emphasis.[35]

On the facts it was perhaps open to the Court to answer this argument either on the ground that the defendant was only of "impressive size" and hence not large enough to fall within the rule which the Government was asking the Court to adopt or on the ground that the rule was not the law. The Court did not rest its decision on the former ground and then make obiter remarks about size; it relied on the latter ground:

> The Corporation is undoubtedly of impressive size and it takes an effort of resolution not to be affected by it or to exaggerate its influence. But we must adhere to the law and the law does not make mere size an offense or the existence of unexerted power an offense. It, we repeat, requires overt acts and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition nor require all that is possible.[36]

Even if it is assumed that Justices McReynolds and Brandeis, who did not participate in the decision, would have voted with the three dissenters, and therefore that the dissenting opinion is better authority than the majority opinion, one must still conclude that

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[34] See Rostow, *supra* note 9, at 758-760; note 4 at 127, 129.
[35] 251 U.S. at 450.
[36] *Id.* at 451.

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more than size is required to establish a violation of Section 2. For in his dissenting opinion Mr. Justice Day reasoned:

> I agree that the act offers no objection to the mere size of a corporation, nor to the continued exertion of its lawful power, when that size and power have been obtained by lawful means and developed by natural growth, *although its resources, capital and strength may give to such corporation a dominating place in the business and industry with which it is concerned.* It is entitled to maintain its size and the power that legitimately goes with it, provided no law has been transgressed in obtaining it.[37]

For the dissenters, the manner in which the size had been achieved, not the size itself, established the violation.[38] This view of the legality of size was reaffirmed without dissent seven years later in the *International Harvester* case.[39]

Since the *Harvester* decision in 1927 the question of the legality of size has been squarely raised only in the recent *Alcoa* case.[40] Analysis of that decision will be deferred, however, for a brief mention of other cases which are used to support the view that the ruling in the old *Steel* case has now been rejected.

Professor Rostow finds support for his position in a footnote to the *Griffith* opinion. After referring to the statement in the *Steel* case to the effect that mere size is not outlawed by Section 2, the Court's footnote added: "But size is of course an earmark of monopoly power . . ."[41] Professor Rostow comments blandly on this footnote: "Rarely has the phrase 'of course' been used more blandly in the art of overruling cases."[42] This comment is completely baseless. It is indeed "of course" true that size is "an earmark of monopoly power." But the issue is not whether size can produce monopoly power. The issue is whether there is anything necessarily unlawful about that degree of size.[43] Is the crime of monopolization no more than the control of monopoly power?

Professor Rostow interprets the *Schine* and *Griffith* cases as answering this question in the affirmative.[44] "Having found that monopoly power existed in both these cases, the Supreme Court

37 *Id.* at 460-461 (emphasis added).

38 "This record seems to me to leave no fair room for a doubt that the defendants, the United States Steel Corporation and the several subsidiary corporations which make up that organization, were formed in violation of the Sherman Act." 251 U.S. at 457; see also 458 ff.

39 United States v. International Harvester Co., 274 U.S. 693, 708 (1927). Justices McReynolds, Brandeis and Stone did not participate.

40 See note 23 *supra.*

41 United States v. Griffith, 334 U.S. 100, 107 (1948).

42 Rostow, *op. cit. supra* note 9, at 774, n. 65.

43 Moreover, an "earmark", or evidence, of monopoly power is not necessarily proof of monopoly power.

44 Schine Chain Theatres v. United States, 334 U.S. 110 (1948); United States v. Griffith, 334 U.S. 100 (1948).

[ordered divestiture]."[45] But the Court did more than find the mere *existence* of monopoly power; it found that this power was actually used "with crushing effect on competition."[46] The misuse of monopoly power consisted of the practice of circuit buying—using the monopoly control of closed towns to secure competitive advantages in open towns. This abuse of power, not its mere existence, was the crux of the violations by Schine and Griffith. The Court did not intimate that there was anything necessarily unlawful in the mere existence of monopoly power in the closed towns.

Only once—in the famous dictum by Mr. Justice Cardozo in the *Swift* case—has the Court ever suggested that monopoly power is in itself unlawful. "Mere size . . . is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly . . ."[47] But even here it is assumed that "impressive size" is lawful and it is not stated unequivocally that if size is magnified to monopoly it is *ipso facto* unlawful. Indeed, in the *Alcoa* case the Court did not so understand the law. For Judge Hand did not rest with the conclusion "that 'Alcoa's' monopoly of ingot was of the kind covered by §2."[48] He clearly stated that monopoly power and unlawful "monopolization" are not one and the same:

> It does not follow because 'Alcoa' had such a monopoly, that it 'monopolized' the ingot market; it may not have achieved monopoly; monopoly may have been thrust upon it.[49]

Whatever the phrase means, a monopoly which is "thrust upon" the defendant is not unlawful. Judge Hand notes that the courts have always assumed that some monopolies may be lawful,[50] and

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[45] Rostow, *supra* note 9, at 775. And see p. 784 where Professor Rostow states that in the *Griffith* case the Court "freely inferred" an intent to use monopoly power from the existence of the power. Compare his interpretation of the decision as resting on an inferred intent to use the power with the language quoted in note 46 *infra*; the decision clearly rested on actual misuse of power.

[46] 334 U.S. at 107. See also p. 108: By engaging in circuit buying, "he is *using* monopoly power to expand his empire . . . . It is in either case a *misuse* of monopoly power . . . [Monopoly power may not] *be used* to beget monopoly . . . . *be used* to monopolize . . . . [or] *be used* to stifle competition . . . ." (emphasis added).

[47] United States v. Swift & Co., 286 U.S. 106, 116 (1932). "Mere size, according to the holding of this court, is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly (United States v. United States Steel Corp. . . . United States v. International Harvester Co.) . . . but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."

[48] 148 F. (2d) at 429.

[49] *Ibid.*

[50] "Nevertheless, it is unquestionably true that from the very outset the courts have at least kept in reserve the possibility that the origin of a monopoly may be critical in determining its legality; and for this they had warrant in some of the congressional debates which accompanied the passage of the Act. *In re* Greene, C.C. Ohio, 52 Fed. 104, 116, 117; United States v. Trans-Missouri Freight Association, 8

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then cites examples of lawful monopolies—those which are "thrust upon" the defendant.[51]

The question whether Alcoa's monopoly fell within the lawful or the unlawful category was answered by referring to two factors —Alcoa's unlawful conduct from 1909-1912, and Alcoa's "persistent determination to maintain the control, with which it found itself vested in 1912."[52] In short, Alcoa's monopoly was not in the lawful class because it was illegally created and purposefully maintained. Both of these factors are stressed by Judge Hand.

After posing the question whether Alcoa was "the passive beneficiary of a monopoly," he immediately refers to the early misconduct.

> Already in 1909, when its last lawful monopoly ended, it sought to strengthen its position by unlawful practices, and these concededly continued until 1912.[53]

And when he later states that, "We need charge it with no moral derelictions *after* 1912 . . .,"[54] he indicates that we need the derelictions before 1912 to establish the violation.

Judge Hand lays even more emphasis on the factor of design to maintain monopoly power. This "design" is to be distinguished

Cir., 58 F. 58, 82, 24 L.R.A. 73. This notion has usually been expressed by saying that size does not determine guilt; that there must be some 'exclusion' of competitors; that the growth must be something else than 'natural' or 'normal'; that there must be a 'wrongful intent,' or some other specific intent; or that some 'unduly' coercive means must be used. At times there has been emphasis upon the use of the active verb, 'monopolize,' as the judge notes in the case at bar. United States v. Standard Oil Co., C.C. Mo., 173 F. 177, 196; United States v. Whiting, D.C. 212 F. 466, 478; Patterson v. United States, 6 Cir., 222 F. 599, 619; National Biscuit Co. v. Federal Trade Commission, 2 Cir., 299 F. 733, 738. What engendered these compunctions is reasonably plain; persons may unwittingly find themselves in possession of a monopoly, automatically so to say: that is, without having intended either to put an end to existing competition, or to prevent competition from arising when none had existed; they may become monopolists by force of accident. Since the Act makes 'monopolizing' a crime, as well as a civil wrong, it would be not only unfair, but presumably contrary to the intent of Congress, to include such instances." 148 F. (2d) at 429-430.

[51] "A market may, for example, be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand. Or there may be changes in taste or in cost which drive out all but one purveyor. A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: *finis opus coronat.* The successful competitor, having been urged to compete, must not be turned upon when he wins." 148 F. (2d) at 430. See text *infra* at note 84 for another illustration of a lawful monopoly suggested by the Supreme Court.

[52] 148 F. (2d) at 430.

[53] *Ibid.*

[54] (Emphasis added.) Professor Rahl describes this sentence as written in a "moment of enigma". See Rahl, Book Review (1948) 43 Ill. L. Rev. 421, 423 (n. 8). But at the very least, Judge Hand should be credited with keeping "in reserve the possibility that the origin of a monopoly may be critical in determining its legality." See 148 F. (2d) at 429. It seems more likely that Judge Hand was writing his decision on a narrow ground than that he was lost in his own enigma.

from the type of "intent" which he expressly stated should be disregarded.[55] A specific intent "which goes beyond the mere intent to do the act" would be established by showing "that many transactions, neutral on their face, were not in fact necessary to the development of 'Alcoa's' business, and had no motive except to exclude others and perpetuate its hold on the ingot market."[56] A defendant with this sort of malicious motive would violate the Act even if he failed to achieve a monopoly.

The Court felt it unnecessary to consider whether Alcoa's conduct was motivated by a malicious desire to injure competitors. But Judge Hand does stress the fact that Alcoa's expansion and maintenance of monopoly power "could only have resulted, as it did result, from a persistent determination to maintain the control, with which it found itself vested in 1912."[57] Alcoa "meant to keep, and did keep, that complete and exclusive hold on the ingot market with which it started."[58] This degree of long-range intent, though not an intent to adopt maneuvers for the sole purpose of excluding competition, is still required by Section 2.

Rather than holding that the mere existence of monopoly power violates Section 2, the *Alcoa* decision expressly recognizes that a monopoly may be lawful. The holding is that a monopoly is unlawful if for three years it was maintained by specifically illegal practices and thereafter by persistent design.

Professor Rostow, however, understands the holding to be that "The power over prices inherent in the size of Alcoa, in relation to the market as a whole, constituted a sufficient basis for the conclusion that it was violating the Act."[59] For this proposition he relies on the paragraph in which Judge Hand points out that a monopolist necessarily has the power to fix prices; this power is

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55 "We disregard any question of 'intent'." 148 F. (2d) at 431. It seems quite clear that by using the word "intent" in quotation marks Judge Hand had in mind the concept of "specific intent." For he immediately refers to the "specific intent" requirement in the attempt situation (p. 432), and later expressly states that "intent," as distinguished from "specific intent", is required by §2.

"In order to fall within §2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any 'specific,' intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing. So here, 'Alcoa' meant to keep, and did keep, that complete and exclusive hold upon the ingot market with which it started." (p. 432)

In other words, if it can be shown that the possessor of monopoly power carried out a persistent program designed to acquire or maintain a monopoly, there is no need to prove a specific intent to violate the law.

56 148 F. (2d) at 432.

57 *Id.* at 430.

58 *Id.* at 432.

59 Rostow, *supra* note 9, at 762. "In the *Aluminum* case Judge Hand finally interred and reversed the old dictum that size is not an offense under the Sherman Act. Size, he concluded, was not only evidence of violation, or a potential offense, as in Justice Cardozo's conciliatory formula of the *Swift* case: it was the essence of the offense. Size, meaning market control, was what competition and monopoly were about." Rostow, *op. cit. supra* note 4, at 762.

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of course exercised whenever the monopoly sells.[60] But Professor Rostow ignores the structure of the opinion when he infers from this paragraph that power over prices inherent in monopoly is a sufficient basis for finding a violation.

At this point in the opinion, Judge Hand was meeting defendant's argument that its monopoly was not of the kind covered by Section 2 because it had made only reasonable profits; it had not abused its power.[61] Judge Hand properly rejected this argument by referring to the cases which hold that price-fixing is unlawful even if the fixed price is reasonable.[62] His conclusion at the end of this section of the opinion was not that Alcoa had therefore violated the Act.[63] Instead he quite pointedly concluded that Alcoa had a monopoly of the Section 2 kind, and then added that it did not therefore follow that Alcoa had "monopolized."[64] Professor Rostow has failed to differentiate two questions which Judge Hand was at pains to treat separately: (1) Was Alcoa a monopoly? (2) If so, did it monopolize? The very fact that the Court asked the two questions instead of only the first proves that mere size is not a violation of the Sherman Act.[65]

In holding that monopoly power violates Section 2 if it has been improperly acquired or maintained, Judge Hand could rely on his own reasoning in the early *Corn Products Refining Co.* case.[66] He there decided that the combination of ninety per cent of the industry into one company was unlawful, whether or not the law required proof of wrongful exercise of the resulting monopoly power. Although his analysis of the state of the law in 1916 left

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60 148 F. (2d) at 427-428.

61 Defendant argued that its profit of ten per cent "could hardly be considered extortionate." (426-427) The opinion met this argument: "There are, however, two answers to any such excuse;" (1) that the profit on ingot was not necessarily the same as the profit on the whole business, and (2) that in any event a monopoly is still a monopoly even if it makes only reasonable profits. A monopolist cannot disprove the existence of his monopoly by showing only reasonable profits; the Government, however, might prove that the monopolist monopolized by showing extortionate profits.

62 United States v. Trenton Potteries Co., 273 U.S. 392, 397-398 (1927); United States v. Socony-Vacuum Co., 310 U.S. 150, 220-224 (1940).

63 If that had been his conclusion, it would seem that the violation would have been of §1 not §2. Or conversely, if monopolization is nothing more than price-fixing, a defendant could not be punished under both sections for conspiring to fix prices. *Cf.* American Tobacco Co. v. United States, 328 U.S. 781, 787-788 (1946).

64 See text *supra* at notes 48 and 49.

65 Perhaps it would be more precise to divide the opinion into three questions: (1) Was Alcoa a monopoly (422-426)? (2) Was it the kind of monopoly covered by §2 (426-429)? (3) Did Alcoa monopolize (429-432)? The first question was answered by the careful reasoning that Alcoa controlled 90% of the nation's ingot capacity. In answer to the second, the Court properly decided that reasonable profits did not change the character of the monopoly. But if all monopolists monopolized whenever they sell, there would have been no need to raise the third question—unless it is again assumed that Judge Hand prefers enigma to carefully organized opinion. See note 54 *supra.*

66 United States v. Corn Products Refining Co., 234 Fed. 964 (S.D. N.Y. 1916).

him in doubt as to whether the power had to be abused, he seemed to favor the view that the mere possession of that degree of economic power, when "acquired by some form of combination," was proscribed.[67] In this view, the manner of acquisition is critical. It would be unlawful for the five major motion picture producers to combine in order to achieve monopoly power. But if television should drive all but one producer out of business, the possessor of the resulting monopoly would not be guilty of monopolization. The emphasis in Judge Hand's opinions, and in the railroad merger cases, is on the process of acquiring or maintaining the power.[68] This attention to the method of growth instead of just the end product appropriately recognizes that the statute uses a verb, not a noun, to define the crime.

Although this emphasis on the history of the defendant is somewhat inconsistent with the holding in the old *Steel Corporation* case,[69] it accords perfectly with the unanimous view of the justices who participated in that decision that mere size is not an offense.[70] Since monopoly size is not in itself unlawful, it obviously follows that the mere existence of impressive size is not prohibited.

II.

The typical situation, found in most of our basic industries, discloses a number of large, fully integrated companies, sometimes only two or three, sometimes twenty or more, possessing in the aggregate the great preponderance of productive capacity. Two entirely different legal situations may be found in such a typical industry. In one the parties take parallel action as a result of an illegal agreement among themselves; in the other they take parallel action as a result of separate response to the stimuli of the market. The *Tobacco* case[71] is an example of the first situation; it is said that this case also establishes the illegality of the second situation.

To test this conclusion, it will be helpful to examine the legal basis for the *Tobacco* decision. Professor Rostow concludes that "three companies together were regarded as a monopoly, under cir-

[67] *Id.* at 1011-1015.

[68] The Supreme Court condemned the "consolidation of two great competing systems of railroads" in United States v. Union Pacific RR Co., 226 U.S. 61, 88 (1912), and a combination which was "not the result of normal and natural growth and development" in United States v. Southern Pacific Co., 259 U.S. 214, 230 (1922).

[69] See note 29 *supra*. The *Alcoa* decision is not necessarily inconsistent with the old *Steel* case because the methods used to form U. S. Steel might be a proper way to achieve impressive size but an improper way to achieve monopoly size. It seems clear, however, that Judge Hand's use of the history of the defendant accords more with the view of the dissenters than with that of the majority in the *Steel* case.

[70] See text at note 37 *supra*.

[71] See note 24 *supra*.

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cumstances in which they produced between 68 per cent and 90 per cent of effective supply."[72] "When three companies produce so large a percentage of market supply, that fact alone is almost sufficient evidence that the statute is violated." "Above all, size— the market position of a small number of large sellers or buyers— is the key point to be proved in a case of monopoly."[73] "The decisive elements are the power to assert a degree of control over price and output in the market as a whole; and the power to deter or discourage potential competition. . . ."[74] But was size the real basis for the Court's decision—or was it conspiracy? Let us see what the opinion says first about conspiracy and then about size.

The issue before the Court was raised by the instructions of the trial judge who had told the jury that actual exclusion of competitors was not a necessary element of the crime of monopolization.[75] The trial judge had taken great care, however, to point out that the existence of a combination or conspiracy was "an indispensable ingredient of each of the offenses charged . . ."[76] The Supreme Court, in quoting these instructions, underscored the reference to conspiracy, and carefully stated that its opinion was predicated on the assumption that the conspiracy had been established.[77] Nor did its reliance on the conspiracy aspect stop there. Although admitting that it was faced with no issue as to the sufficiency of the evidence,[78] the Court devoted ten pages to a summary of the facts supporting the finding of conspiracy.[79] This summary, together with the Court's explicit statements, leave no doubt that the conspiracy was an "essential element" of the offense and that the Court really meant that it is "only in conjunction with such a combination or conspiracy that these cases will constitute a precedent."[80]

This conclusion is reinforced by the Court's treatment of the effect of the size of the defendants. After reciting the facts which established their impressive size, the Court concluded:

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72 Rostow, *op. cit. supra* note 4, at 138.
73 *Id.* at 130.
74 *Id.* at 137.
75 See 328 U.S. 781, 784-786.
76 *Id.* at 786.
77 "While the question before us, as briefly stated in the Court's order, makes no express reference to the inclusion, in the crime of 'monopolization,' of the element of 'a combination or conspiracy to acquire and maintain the power to exclude competitors to a substantial extent,' yet the trial court, in its above quoted instructions to the jury, described such a combination or conspiracy as an 'essential element' and an 'indispensable ingredient' of that crime in the present cases. We therefore include that element in determining whether the foregoing instructions correctly stated the law as applied to these cases. In discussing the legal issue we shall assume that such a combination or conspiracy to monopolize has been established." *Id.* at 786.
78 *Id.* at 789.
79 *Id.* at 798-808.
80 *Id.* at 798.

> The marked dominance enjoyed by each of these three, in roughly equal proportions, is emphasized by the fact that the smallest of them at all times showed over twice the production of the largest outsider. *Without adverse criticism of it,* comparative size on this great scale inevitably increased the power of these three to dominate all phases of their industry. 'Size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past.' *United States v. Swift & Co.,* 286 U. S. 106, 116. An intent to use this power to maintain a monopoly was found by the jury in these cases.[81]

There is no hint that there is anything wrong with size. Of course, size creates power, and power may be abused. But this is true "without adverse criticism" of size itself. At this point it is of interest that the Court quotes only half of the famous Cardozo dictum; it omits the sentence which could be construed as meaning that monopoly is itself unlawful.[82]

Moreover, not only did the Court find nothing inherently wrong with the size of the defendants; it also felt that the "friendly relationship" among these giants was "commendable and beneficial, *as long as it does not breed illegal activities.*"[83] The illegal activities are plainly identified as the conspiracy to exclude competition and to fix prices.

That the conspiracy, rather than the size of the defendants, was the crux of their offense was again made clear by the Court's use of the conspiracy element in discussion of the *Alcoa* case.

> Because of the presence of that element, we do not have here the hypothetical case of parties who themselves have not "achieved" monopoly but have had monopoly "thrust upon" them. See *United States v. Aluminum Co. of America,* 148 F. 2d 416, 429.
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> The present cases are not comparable to cases where the parties, for example, merely have made a new discovery or an original entry into a new field and unexpectedly or unavoidably have found themselves enjoying a monopoly coupled with power and intent to maintain it. In the *Aluminum Co.* case, discussed later, there was a use of various unlawful means to establish or maintain the monopoly. Here we have the additional element of a combination or conspiracy to acquire or maintain the power to exclude competitors that is charged in the fourth count.[84]

The Court here recognizes the existence of a class of legal monopolies, but states that the defendants do not fall within that class *since they conspired* to acquire or maintain monopoly power. It

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81 *Id.* at 796 (emphasis added).
82 See note 47 *supra.*
83 328 U.S. at 793.
84 *Id.* at 786.

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is evident, moreover, that the Court did not read the *Alcoa* opinion as holding that monopoly power and monopolization are one and the same.[85] For the history of Alcoa—its "use of various unlawful means to establish or maintain the monopoly"—was the essential ingredient which when added to size constituted the crime. In the *Tobacco* case, the essential ingredient was the conspiracy to exclude competitors and to fix prices.

It should also be noted that the Court assumes that the enjoyment of a monopoly may be lawful even though "coupled with power and intent to maintain it." The Court is here saying that in the *Alcoa* case the conduct of the defendant after 1912, which according to Judge Hand clearly evidenced a "power and intent to maintain" the monopoly, would not have been sufficient to establish monopolization. The Supreme Court agreed that no moral derelictions had to be shown *after* 1912, presumably because they had been shown for the previous three years.[86]

On the basis of these two cases, the elements of the crime of monopolization appear to include (1) monopoly power (2) acquired and maintained by improper means. A third element of the crime seems also to be required by the *Tobacco* case. After describing the monopoly power of the defendants and the fact that this power to exclude competitors was achieved as a result of conspiracy, the Court concluded that the defendants were guilty of monopolization "provided that they have the intent and purpose to exercise that power."[87]

The Court supplied the following definition of the crime:

> A correct interpretation of the statute and of the authorities makes it the crime of monopolizing, under §2 of the Sherman Act, for parties, as in these cases, to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a power that they are able, as a group, to exclude actual or potential competition from the field and provided that they have the intent and purpose to exercise that power.[88]

Under this definition three elements should be taken into consideration: (1) the way in which power is acquired; (2) the extent of the power; and (3) the actual or intended abuse of power. All three elements are not, however, required to establish a violation.

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85 It is significant that over half of the passages quoted from the *Alcoa* opinion deal with the second question in that case "monopolization"—rather than with the first question—monopoly. See 328 U.S. at 813-814. See text at note 65 *supra.*

86 See note 54 *supra.*

87 328 U.S. at 809.

88 *Ibid.*

In the *Schine* case the Court stated that the first element was not always essential:

> Monopoly power is not condemned by the Act only when it was unlawfully obtained. The mere existence of the power to monopolize, together with the purpose or intent to do so, constitutes an evil at which the Act is aimed.[89]

Professor Rostow relies heavily on this statement, and others to the same effect in the *Paramount*[90] and *Griffith*[91] cases, to support his thesis that the mere existence of monopoly power is unlawful. He feels that this conclusion is justified because the intent requirement is only "perfunctory;"[92] the size itself makes out a prima facie case on the intent issue.[93]

He may be correct that in cases where monopoly power has been obtained through combination of competitors,[94] by predatory tactics,[95] or by means of an unlawful conspiracy,[96] the intent requirement is only perfunctory. Against the background of conspiracy in the recent *Tobacco* case, it was easy to infer a wrongful intent to abuse, as well as to acquire and maintain monopoly power. And it would have been surprising, "to say the least," if the tactics used to combine independent units into the huge New Jersey oil company had not made out a prima facie case of violation of Section 2. But these cases show only that where the first and second of the

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89 334 U.S. at 130.

90 See 334 U.S. 131, 173-174.

91 See 334 U.S. at 107.

92 "Decided by a safe majority of the Court, these three cases make clear both the character and the surprising scope of the new orthodoxy under Section 2.

"In the first place, it is indisputable after these cases that the existence of what the Court will classify as monopoly power, coupled with a perfunctory and implied intent to use it, is illegal without reference to the techniques by which it was obtained." Rostow, *supra* note 9, at 776. It is interesting to note that Professor Rostow considers the possibility of acceptance of his views as "surprising" and a "new orthodoxy."

93 Rostow, *supra* note 9, at 753-756.

94 See *e.g.* United States v. Southern Pacific RR Co., 226 U.S. 61 (1912); United States v. Corn Products Refining Co., 234 Fed. 964 (S.D. N.Y. 1916); United States v. Aluminum Co. of America, 148 F. (2d) at 429.

95 "Indeed, the history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible. *We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proof shows were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations: . . . .*" United States v. American Tobacco Co., 221 U.S. 106, 181-182 (1911) (emphasis added).

96 American Tobacco Co. v. United States, 328 U.S. 781 (1946); *Cf.* United States v. Paramount Pictures, 334 U.S. 131, 170 (1948).

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elements described above are present, the third is hardly necessary. They do not indicate that the proof of intent may be perfunctory where no more than the existence of monopoly power has been established. In fact, in the *Standard Oil* opinion, while laying down the "rule of reason" for interpreting Section 2, the Court pointedly refers to "the omission of any direct prohibition against monopoly in the concrete."[97] The Court, as it properly could on the facts of that case, interpreted "monopolize" as primarily referring to an attempt to create monopoly power.

In the *Schine* and *Griffith* cases, though the history of the defendants' acquisition of monopoly power was not crucial, the violations of Section 2 were proved by evidence of not only power but also abuse of power. Schine and Griffith each controlled large chains of motion picture theatres, operating in both "closed" towns and "open" towns. They had a monopoly on motion picture exhibition in the closed towns and competed with independents in the open towns. Both circuits engaged in the practice of "circuit buying"; they bought films for their entire chains at one time. This use of the bargaining power derived from monopoly control of closed towns in order to obtain unfair competitive advantages in open towns was condemned by the Supreme Court as a violation of Sections 1 and 2. The Court there found that a particular use of monopoly power was unreasonable and therefore should be condemned as "monopolization." The holding is that power plus abuse of power violated Section 2.[98] It does not support the thesis that the mere existence of monopoly power is a violation.

The *Paramount* case affords no greater support for Professor Rostow's thesis. In the divestiture section of the opinion, from which he quotes at length, the Court simply says that the distributors should not be permitted to retain any of the fruits of their unlawful conspiracy.[99] If monopoly power was acquired by wrongful means, or if the defendants misused, or intended to misuse such power, they violated Section 2. But the divestiture was limited to theatres which the defendants had obtained unlawfully; the Court considered such divestiture as "no more punishment than the familiar remedy of restitution."[100]

Having found a conspiracy, the Court required the defendants to dispose of their interests in jointly-owned theatres in three types

[97] 221 U.S. at 62.
[98] See notes 45, 46 and text *supra*.
[99] Professor Rostow relies heavily on divestiture aspects of these cases, but the Court did no more than require the defendants to dispose of theatres acquired as a result of its abuse of power. It also stated in the *Schine* case that even after such divestiture, further relief might be necessary if the defendants were still monopolizing; that is, if they still had monopoly power plus intent to abuse that power. See 334 U.S. at 129-130.
[100] 334 U.S. at 171-172; see also p. 128.

of situations: (1) where the defendant's interest was acquired unlawfully; (2) where it was used unlawfully; and (3) where the theatre was jointly owned with a competitor or potential competitor; that is, "any former, present or potential motion picture operator."[101] On the basis of a somewhat unclear paragraph,[102] Professor Rostow reads the opinion as requiring a fourth category of "disaffiliation"; namely, where the joint ownership results in monopoly.[103] As we read the paragraph, it merely says that there are instances of joint ownership with non-competing investors which need not be dissolved even "absent a finding that *no* monopoly resulted." In other words, the defendant can retain its joint investment whether the court found a monopoly or no monopoly. Professor Rostow's reading of the paragraph requires the omission of the word "no." But even if his reading is correct, against the background of conspiracy which the Court found in the *Paramount* case, the restrictions on monopoly power required in the decree are hardly support for the view that the mere existence of monopoly power violates Section 2.

Perhaps, however, the most convincing answer to Professor Rostow's view that the *Schine, Griffith,* and *Paramount* cases have developed a "new orthodoxy under Section 2" is found in a recent statement by the author of those opinions. In his dissent in *Standard Oil Co. v. United States,* Mr. Justice Douglas objurgates the majority for its tolerance of bigness. He complains vehemently because monopoly power has been condemned in only certain situations, and cites the three motion picture cases as examples of a too narrow exception to the Court's general practice of permitting monopoly to flourish. They are cited after this statement: "Monop-

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[101] *Id.* at 151.

[102] The full paragraph is as follows:

"It seems, however, that some of the cases of joint ownership do not fall into any of the categories we have listed. Some apparently involve no more than innocent investments by those who are not actual or potential operators. If in such cases the acquisition was not improperly used in furtherance of the conspiracy, its retention by defendants would be justified absent a finding that *no* monopoly resulted. And in those instances permission might be given the defendants to acquire the interests of the independents on a showing by them and a finding by the court that neither monopoly nor unreasonable restraint of trade in the exhibition of films would result. In short, we see no reason to place a ban on this type of ownership, at least so long as theatre ownership by the five majors is not prohibited. The results of inquiry along the lines we have indicated must await further findings of the District Court on remand of the cause." 334 U.S. at 153 (emphasis added).

[103] On the basis of this fourth category he concludes:

"The fourth proviso in this part of the opinion is a clear application of the Court's view that where monopoly, in the sense of economic power alone, exists in any appreciable part of the economy, it is illegal quite apart from its exercise, or any specific investigation of the purpose behind its acquisition or retention." Rostow, *op. cit. supra* note 9, at 766-767.

But if this were true, in the *Schine* case the Court would have ordered divestiture in all of Schine's closed towns and would not have criticized the District Court for its failure to find which of Schine's theaters were lawfully acquired and which unlawfully acquired. See 334 U.S. at 137-138.

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oly that has been built as a result of unlawful tactics, *e.g.*, through practices that are restraints of trade, is broken up."[104] If he construed these cases the way Professor Rostow does, there would be no occasion for his unusually vigorous dissent in the *Standard Oil* case.[105]

It seems to us that Professor Rostow's assumption that the element of intent can be dismissed as "perfunctory and implied" evidences a failure to differentiate between two importantly different classes of cases—those where monopoly power is acquired wrongfully, and those where the power is legally acquired. In the first class, represented by the *Standard Oil, Alcoa,* and *Tobacco* cases, the proof of intent to use the power may be "perfunctory." In the second class, represented by the *Griffith* case, the crime has always been proved by showing both power and illegal exercise of power. Perhaps an intent to acquire and maintain the power could then be "implied" from its mere existence and abuse.[106] But the rule to be derived from these cases is that where two of the three elements discussed in the *Tobacco* case are present, the third is not, as a practical matter, essential. "Monopolization," in other words is the wrongful acquisition or wrongful use of monopoly power; it also consists in the wrongful intent to acquire or the wrongful intent to exercise the power.[107] Where the existence of the violation hinges on proof of "specific intent," a high order of proof has always been required.

This view of the crime of monopolization is, we believe, justified by the underlying philosophy of the Act. It is clear from the debates that preceded the adoption of the Act that Congress was concerned with the growth of a few large corporations in certain basic industries, largely through the acquisition of competing companies by the exercise of economic power.[108] The fear that such

[104] 17 U. S. L. Week 4510, 4517 (1949).

[105] Mr. Justice Douglas indicates that since the Court's economic theories force him to choose between bigness and exclusive dealing contracts, contrary to the Court he would choose the latter. He seems almost to say that he would vote for a wrong decision in this case because the Court wrongly decided the *Columbia Steel* case. See esp. 17 U. S. L. Week at 4518.

[106] In the *Paramount* case, 334 U.S. at 173, quoted by Rostow, *supra* note 9, at 768, the Court is careful to state that the intent "to create" a monopoly, as distinguished from the intent to abuse monopoly power, can be implied from its existence.

[107] The obvious but important distinction between the two situations where intent is crucial is often overlooked. The intent to acquire monopoly power is the crucial issue where the power has not yet been achieved; Professor Rostow agrees that real evidence of "specific intent" is required here. Where the power has been achieved lawfully and not yet abused, the intent to abuse the power is then crucial. Although the Court is always careful to state this requirement, and therefore to suggest that some evidence in addition to the power itself is needed, Professor Rostow apparently feels that the Court does not mean what it says about this type of intent.

[108] Cong. Rec. Vol. 21, Par. 3, pp. 2456-2460, 62, 2645-2726, 2728, 2791, 2928; Cong. Rec. Vol. 21, Par. 5, pp. 4089, 4093, 4098, 4101; Vol. 21, Par. 6, p. 5954.

large corporations had or soon would exert undue control over the fields in which they were operating was frequently expressed. The remedy proposed and finally adopted was to place restrictions upon the misuse or threatened misuse of the power resulting from a monopolistic position. No limitation as such was placed on the size or future growth of any business. Nor was it implied that the courts should announce an optimum size for corporations. The term monopolize was not defined. This definition was left to the courts applying the concept of monopoly as it had been developed up to that time by the law in this country. The only test, as Chief Justice White points out in his elaborate historical development of the subject in the *Standard Oil* case, is whether the actual or intended *conduct,* not the size, of the defendants is unreasonably restrictive of competitive conditions.[109]

III.

What then is the legal basis for attacking the impressive size of the units in most of our basic industries? Where no one concern is large enough to possess monopoly power, the attack on size can be made by only two routes. The units may be attacked individually on the theory that each is attempting to acquire monopoly power for itself. Or the group of units may be attacked collectively on the theory that they are engaged in a conspiracy to monopolize.

The recent *Columbia Steel* decision effectively forecloses the first of these possible attacks.[110] U. S. Steel, which is still a company of impressive size though it is not a monopoly,[111] did not violate the Sherman Act by purchasing the assets of the largest independent steel fabricator on the West Coast. On the Section 2 issue, whether the purchase constituted an attempt to monopolize, the Court regarded a showing of specific intent as necessary to establish violation.[112] The evidence did not show such an intent and the Court did not suggest that it could be implied merely because of the size of the defendant.

It is true that four justices dissented on the ground that U. S. Steel was already "big enough."[113] Though the exact legal basis of the dissent is not entirely clear,[114] it is unequivocally asserted that

[109] Standard Oil Co. v. United States, 221 U.S. 1, 61-62 (1911); United States v. American Tobacco Co., 221 U.S. 106, 181-183 (1911).

[110] United States v. Columbia Steel Co., 334 U.S. 495 (1948).

[111] *Id.* at 533.

[112] *Id.* at 531-532.

[113] *Id.* at 540. Mr. Justice Douglas' dissenting opinion was joined by Justices Black, Murphy and Rutledge.

[114] When Mr. Justice Douglas states that the business of Consolidated should not be considered insubstantial because the aim of U. S. Steel's "well-conceived project is to monopolize it", 334 U.S. at 537-538, he seems to be talking Section 2 language. Similarly, his statement that "We have here the problem of bigness" (p. 535), his emphasis on the size of the defendant, and his suggestion that he would agree with the majority if the acquisition were by a small West Coast producer rather than

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the philosophy of the Sherman Act is opposed to the existence of size.

> Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men.[115]

This frank hostility of the dissenters to size reinforces the conclusion that the majority of the Court does not regard the mere existence of impressive size as an offense. They are unwilling to adopt the fiction that a large company has a specific intent to acquire monopoly power—and therefore is guilty of the crime of monopolization, or attempting to monopolize—merely because it is a large company.

But is the majority of the Court willing to adopt a different fiction in order to implement a judicial attack on size? This is the fiction that several large companies are guilty of participating in a conspiracy merely because their normal, independent market behavior is as undesirable as if they really had conspired.

Professor Rostow advocates this attack on size. For him the crime does not consist in the attempt to acquire a greater share of the business but rather in satisfaction with less-than-monopoly position. For if all the giants are satisfied to let one another survive, they all derive the benefits of "monopolistic competition." Without any express, or even tacit, agreement among themselves, they tend to take parallel action in response to the stimuli of the market. They therefore, it is suggested, should be found guilty of conspiracy to monopolize in violation of Section 2.[116] This second

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by an "eastern giant" (539) all suggest a violation of §2. Nevertheless, he rests his conclusion on §1 which condemns "the character of the restraint" rather than the amount of commerce affected (p. 537); the "monopoly" of 3% of the West Coast market for rolled steel is a restraint of the character forbidden by §1 (p. 539). But how can the "character of the restraint" be critical, when it is admitted that a restraint of exactly the same character would be lawful if imposed by a smaller defendant? If the answer is that the character of the restraint varies with the character of the defendant, and perhaps also with the character of the market, it would seem fairer to phrase the test in terms of reasonableness and frankly to identify the factors influencing judgment.

115 334 U.S. at 536.

116 "That is to say, the necessary consequence of the economic organization of the industry is that the large and dominant sellers, if they have a decent regard for their own interests, will act as if they had 'combined,' in the sense of the *Tobacco* and *Paramount* cases, although their officers may never have talked to each other, even on the phone or the golf course. The market power of the dominant firms is used 'collectively' in the phrase of the *Paramount* case. Under such circumstances, why shouldn't the courts infer the required degree of combination from the fact that the economic power of the separate companies has been effectively combined for purposes of price policy, very much as the courts infer 'statutory intent' to maintain a monopoly from the fact that monopoly power exists? And isn't such a process of inference close to being accepted practice today?" Rostow, *supra* note 9, at 785.

possible method of attack on size is a group attack which requires proof of conspiracy.

Proof of conspiracy is by no means as difficult today as formerly, but our precise problem is whether the quantum of proof required is now so slight that the major units in an industry may not respond to market forces in the same way without being found guilty of conspiracy. If the response is not only uniform but also highly abnormal, reasonable jurors or judges may well conclude that the response is the result of an actual illicit agreement. But when the response is the normal business reaction to market changes, the basis for the conclusion vanishes.[117] For different sellers, acting independently and motivated only by their own self-interest, will frequently respond similarly to the stimuli of the market. The cases do not lend any support to the view that such normal response creates an inference of conspiracy.

The *Tobacco* case certainly does not support such a broad conclusion. Though the conspiracy was there proved by circumstantial evidence, the proof was nonetheless substantial.[118] All that the Supreme Court said about the proof was that it was sufficient to sustain the jury's decision on the facts that the defendants had actually participated in a criminal conspiracy. In view of the Court's respect for jury findings on fact issues, this result was certainly not surprising. But it is far different from the possible view that the economic effects of the defendants' conduct were just

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117 "Normal business reaction" is here intended to include any truly independent action taken by a seller even though he is reasonably certain that he knows what effect his action will have on policies of other sellers and even though he bases his decision in whole or in part on the expected response by the other sellers.

Chamberlin recognizes the important distinction between actual agreement, which produces monopoly, and independent though well-informed action. In the latter case, each seller "is forced by the situation itself to take into account the policy of his rival in determining his own, and this cannot be construed as a 'tacit agreement' between the two.

"This is true, no matter how complex the manner in which his competitor's policies figure in the determination of his own. A certain move, say a price cut, may be advantageous to one seller in view of his rival's *present* policy, i.e., assuming it not to change. But if his rival is certain to make a counter move, there is no reason to assume that he will not; and for the first seller to recognize the fact that his rival's policy is not a datum, but is determined in part by his own, cannot be construed as a negation of independence. It is simply to consider the indirect consequences of his own acts—the effect on himself of his own policy, mediated by that of his competitor. Of course, he may or may not take them into account, but he is equally independent in either case." Chamberlin, *op. cit. supra* note 1, at 31.

118 The practices in the leaf tobacco market were especially persuasive on the conspiracy issue. None of the defendants would bid in a market unless the other two were bidding; they consulted with one another about new markets; in advance of bidding on any day, the buyers for all three were instructed to observe the same top limits for bids; they bid on only selected types of tobaccos. When manufacturers of lower priced cigarettes began to increase their share of the business, all defendants began to buy up cheap tobacco though they apparently never used it. See 328 U.S. at 800-804. As for the phase of the conspiracy concerning the fixing of the price of cigarettes, again the proof showed abnormal as well as parallel behavior. *Id.* at 804-808.

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as undesirable whether or not they actually conspired, and therefore they are conspirators even though they did not participate in a conspiracy.[119] This is the legal step which Professor Rostow apparently believes the Supreme Court is prepared to take.[120] The available evidence, however, indicates that the Court would refuse to take such a step.

Though the *Rigid Conduit* case was a Federal Trade Commission action challenging the use of basing point pricing methods, the action of the Supreme Court in that case is of interest here.[121] The complaint was in two counts, the first charging a conspiracy to use a basing point method of quoting conduit prices, and the second charging that the individual use of basing points with knowledge that competitors were using the same system constituted an unfair method of competition under Section 5 of the Federal Trade Commission Act.[122] The Court of Appeals sustained the Commission on both counts. The Supreme Court declined to review the first part of the charge, apparently because the record contained ample evidence of actual agreement among competitors to use a particular method of quoting prices.[123] But the Court did grant certiorari to review the parts of the order which were based on Count II.[124]

In argument before the Supreme Court the Government explicitly disclaimed any charge of conspiracy, contending instead that "conscious parallel action resulting in price uniformity"[125] was equally illegal. In essence it was argued that although there was no conspiracy, the parallel action was just as undesirable as if there had been an actual agreement, and therefore it was proper to dispense with the necessity of finding conspiracy.[126] In this particular case the Government prevailed as the Court of Appeals was affirmed by an equally divided Court.

The law of the *Rigid Conduit* case may perhaps be cited to sup-

[119] The fact that the *Tobacco* "defendants were held guilty on criminal charges—always psychologically more difficult to sustain than civil proceedings—" (see Rostow, the New Sherman Act: A Positive Instrument of Progress (1947) 14 U. of Chi. L. Rev. 567, 584) supports the conclusion that the jury believed that an actual conspiracy had been proved.

[120] Rostow, *op. cit. supra* note 4, at 135: "Parallel action based on acknowledged self-interest within a defined market structure is sufficient evidence of illegal action."

See also Rostow, *supra* note 9, at 783-785. His reliance on the basing-point cases seems misplaced, because in those cases the price uniformity was regarded as evidence of actual conspiracy, rather than as something bad irrespective of whether there was any conspiracy. *Cf.*, the *Rigid Conduit* case discussed *infra*.

[121] Clayton Mark & Co. v. Federal Trade Commission, 336 U.S. 956 (1949) reported below at 168 F. (2d) 175 (C.A. 7th 1948).

[122] 38 Stat. 719 (1914), 15 U.S.C. 45.

[123] 168 F. (2d) at 177-178, 180.

[124] 336 U.S. 902.

[125] 17 U. S. L. Week 3293, 3295.

[126] *Cf.* Rostow, *op. cit. supra* note 4, at 126: "An understanding of the common interest of a few large sellers in parallel action has dispensed with the need of proof of their conspiracy."

port the view that conspiracy is no longer an essential ingredient of an anti-trust violation. But the holding of that case applies only to an individual's use of a particular method of quoting prices. It may be an unfair method of competition to quote prices by the basing-point method when all other sellers use the same method. But this, at best, can only justify a remedy forbidding the future use of that pricing method. There is nothing in the *Rigid Conduit* holding to support the conclusion that a fictional conspiracy may be substituted for the actual proof heretofore required to establish a collective violation of Section 2 of the Sherman Act.

In fact, rather than supporting the view that the Court is willing to condemn action because it is supposedly just as bad as conspiracy, the division of the Court in the *Rigid Conduit* case more probably indicates that a real conspiracy, not just a fictional conspiracy, is an essential element of the crime. The four justices who voted to reverse the Court of Appeals must have felt that a finding of conspiracy was needed to render the use of the basing-point pricing system unlawful under Section 5 of the Federal Trade Commission Act even though that statute does not expressly call for such a finding. If the argument that parallel action is just as bad as agreement did not prevail under that statute, it would certainly fail to convince those four justices that a fictional conspiracy would satisfy the express requirement of Section 2 of the Sherman Act.

Under this analysis, the vote of Justice Jackson, who did not take part in the *Rigid Conduit* decision, might well be crucial in a test of Professor Rostow's fictional conspiracy theory. His separate opinion in *Krulewitch v. United States* indicates that he considers the present requirements for proof of conspiracy too liberal rather than too strict.[127] Moreover, his vote in the *Columbia Steel* case suggests that mere size would not persuade him to dispense with proof of conspiracy any more than it there persuaded him to dispense with proof of specific intent.[128] It would seem probable, therefore, that the Court would divide as it did in the *Columbia Steel* case in the face of another attack based solely on the size of the defendants.[129]

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[127] Krulewitch v. United States, 336 U.S. 440, concurring opinion at 451-452 (1949).

[128] *Cf.* text at note 112, *supra.*

Presumably the four justices who voted to affirm the *Rigid Conduit* case were the four dissenters in the *Columbia Steel* case.

[129] Mr. Justice Douglas agrees with this conclusion. See his dissenting opinion in Standard Oil Co. of California v. United States, 17 U. S. L. Week 4510, 4517 (1949), especially the following passage:

"Monopoly that has been built as a result of unlawful tactics, e. g., through practices that are restraints of trade, is broken up. But when it comes to

This conclusion is consistent with the principle of the *Masonite* and *Interstate Circuit* cases that individual participation, with knowledge that competitors are also participating, in a plan which necessarily results in a restraint of trade, is sufficient to establish an unlawful conspiracy.[130] In those cases the defendants joined a well-defined program to put an end to existing competition.[131] Though each company negotiated independently, each made an express agreement to stifle competition; these express agreements, like the spokes of a wheel, all had a common hub. The rim of the wheel was supplied by the desire to participate even with full knowledge of the scope of the enterprise. The remedy for this violation was to forbid the carrying out of the defined program by enjoining performance of the express agreements.

But "monopolistic competition" does not result from any such plan. There are no express agreements between competitors or between buyer and seller with knowledge that competitors are making identical agreements. The wheel has no hub, no spokes, and no rim. There is no program which will necessarily stifle existing competition; there is thus no conspiracy to be enjoined. In the *Masonite* and *Interstate Circuit* cases, clearly defined concerted action destroyed existing competition. Though such joint action may be appropriately termed "conspiracy," even absent a single express agreement among all participants, it is quite another thing to admit that monopolistic competition results from intelligent independent action and nevertheless ask the court to find conspiracy.

The distinction between the two situations is most clearly seen

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monopolies built in gentlemanly ways—by mergers, purchases of assets or control and the like—the teeth have largely been drawn from the Act.

"We announced that the existence of monopoly power, coupled with the purpose or intent to monopolize, was unlawful. But to date that principle has not shown bright promise in application. Under the guise of increased efficiency big business has received approval for easy growth. *United States v. Columbia Steel Co.,* 334 U.S. 495, *represents the current attitude of the Court on this problem.*" (Emphasis added.)

Mr. Justice Jackson's dissent, as contrasted with that of Mr. Justice Douglas, evinces no hostility to bigness. *Id.* at 4518.

[130] United States v. Masonite Corp., 316 U.S. 265, 274-276 (1942); Interstate Circuit v. United States, 306 U.S. 208, 226-227 (1939).

[131] In the *Interstate Circuit* case, in response to a letter naming officers of eight distributors as addressees, all eight of the distributors contracted with the Interstate Circuit of first-run theatres to force subsequent-run theatres to raise their admission prices and to show fewer double features. 306 U.S. at 215-219. Each distributor entered the arrangement with knowledge that others had been requested to join, and the arrangement was renewed when all knew that everyone else had in fact joined.

In the *Masonite* case, competition among manufacturers of wallboard was restrained when each entered into an agency agreement with Masonite to sell Masonite's hardboard at prices fixed by Masonite. Each "agent" was informed of the terms of every other agency contract. 306 U.S. at 267-274. The arrangement for an express delegation to Masonite of control over prices was considered the equivalent of a price fixing agreement among the competitors (p. 275-276).

in terms of the remedy. If restraint really results from joint action, it can be eliminated by an injunction against the joint action. In such a case there is reason to call the joint action "conspiracy." But if no injunction against joint action can remove the restraint, it is obviously not caused by conspiracy. The restraint, if any, then results from the structure of the industry. It is for this reason that Professor Rostow contends that the structure must be rebuilt, or at least torn down, by the decree.

But recent decisions on the appropriate remedies for anti-trust violations indicate that the Court is not prepared to dismember large companies merely because a different industry structure might be more desirable. In *United States v. National Lead Co.* the Government requested the court to require National Lead and du Pont each to divest itself of one of its two principal titanium pigment plants.[132] A change in the structure of an industry by increasing the number of producing units from two to four might not be sufficiently drastic to satisfy the opponents of size, but it would seem to be a step in the right direction. The Court apparently understood the economic basis of the Government's request as the same as the basis for Professor Rostow's suggested attack on the oil and other similar industries. The Court stated:

> Presumably, the requested divestiture would be for the purpose of providing four instead of two independent major competing plants in the titanium pigment industry.[133]

The Court felt that there was "neither precedent nor good reason" for doubling the number of units in the industry. Since there was no evidence that the physical properties were either acquired or used in violation of the Act, the Court held that there was no basis for ordering divestiture.

> It is not for the courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate the anti-trust laws.[134]

The remedy of divestiture may appropriately be employed to return an industry to the competitive situation which existed before defendants embarked on an illegal campaign. Illegal mergers may be set aside.[135] A monopolist who expands his empire by abusing his monopoly power may be compelled to disgorge the fruits of his wrongful conduct.[136] But by definition the remedy is remedial; it is neither punitive nor a positive instrument of economic or social change.[137]

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[132] United States v. National Lead Co., 332 U.S. 319, 351-353 (1947).
[133] *Id.* at 352.
[134] *Id.* at 353.
[135] United States v. Union Pacific R. Co., 226 U.S. 470 (1913).
[136] United States v. Crescent Amusement Co., 323 U.S. 173 (1944).
[137] See Hartford-Empire Co. v. United States, 323 U.S. 386, 409-410 (1945).

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The only crime which the large companies in the typical industry commit is the crime of doing business in a market which some economists characterize as "monopolistic." This is supposedly a crime because market behavior in such an industry is different from the ideal of "pure" or "perfect" competition. There is no suggestion that the many variations from this ideal, which result from advertising and other causes, are also criminal, though basically the same argument would seem to require a prohibition of most present-day selling techniques. What the argument comes down to is a contention that the remedy would promote competition; therefore the Court should imply a crime in order to justify the remedy. Instead of making the punishment fit the crime, the Court is asked to fashion a crime for the punishment to fit.

The practicing lawyer would be ill-advised to ignore the trend to which Professor Rostow points. The frank position of four members of the Supreme Court is a warning that the judiciary may one day legislate against size. It may even be true that the Court has advanced to the threshold of a new economic era of decentralized industry. It may be at the threshold, but the door is presently barred by a majority of five justices.

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